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Supreme Court Cause No. 10-0142

KATHY HEFFERNAN, ROBIN CAREY, DAVID HARMON, and NORTH DUNCAN DRIVE NEIGHBORHOOD ASSOCIATION, INC.,

Plaintiffs, Petitioners, and Appellees ,

-vs-

THE MISSOULA CITY COUNCIL, CITY OF MISSOULA; and JOHN ENGEN, MAYOR,

Defendants, Respondents, and Appellants,

-and-

MUTH-HILLBERRY, LLC.,

Intervenor-Defendant and Appellant.

OPENING BRIEF OF APPELLANT MUTH-HILLBERRY, L.L.C.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following is a summary of the issues on appeal in this case:

1. Did the District court err in granting Neighbors' motion to strike from consideration the affidavit submitted by Owner in support of its cross-motion for summary judgment concerning the legal effect of a 1989 Agreement between City and Owner's predecessor in title?

2. Did the District Court err in denying Owner's motion for summary judgment concerning the legal effect of the 1989 City-Sunlight Agreement on the density rights applicable to the Sonata Park property?

3. Did the District Court err in granting summary judgment to Neighbors to the effect that the approvals of the zoning and preliminary plat for the Sonata Park Subdivision were "arbitrary, capricious and unlawful", solely because they failed to comply with provisions of the applicable Growth Policy?

STATEMENT OF THE CASE

This case arises out of the approval, on December 17, 2007, by the Missoula City Council of proposed zoning and a preliminary plat for a 37 lot subdivision known as "Sonata Park". This subdivision is situated on land formerly owned by Sunlight Development Company, a subsidiary of Montana Power Company. This land is located on the west side of Rattlesnake Creek, on the north side of the City of Missoula.

The following abbreviations shall be used in this brief:

A. "Neighbors" means the individual plaintiffs in the District Court case, who are the appellees in this case, namely Kathy Heffernan ("Heffernan"), Robin Carey ("Carey"), and David Harmon ("Harmon"). The North Duncan Drive Neighborhood Association, Inc. ("NDDNAI") was also a plaintiff in the District Court case, but the District Court granted[1] the City's motion to dismiss the claims of NDDNAI on the ground that it lacked standing to challenge the actions of the City of Missoula regarding the approvals for the Sonata Park Subdivision. Because NDDNAI did not appeal that decision, the only appellees in this case are the individual plaintiffs, Heffernan, Carey and Harmon.

B. "City" means the Missoula City Council, City of Missoula, and John Engen, Mayor of the City of Missoula, who were the defendants in the District Court case and are appellants in this case.

C. "Owner"means Muth-Hillberry, L.L.C., a Montana limited liability company, whose members are Max Hillberry, DDS, and Frank

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[1] See Clk. Rec. 72, pp. 3-6.

Muth. Owner is the developer of the Sonata Park Subdivision involved in this case. Owner was the Intervenor-Defendant in the District Court case and is an appellant in this case.

D. "Sonata Park" means the 37 lot subdivision approved by the Missoula City Council for Owner's property on December 17, 2007.

E. "Sunlight" means Sunlight Development Company, a former subsidiary of Montana Power Company. In 1989, Sunlight owned 939 acres of land on the west side of Rattlesnake Creek. Owner purchased an approximate 51 acre parcel of this land from Sunlight in 1991. Sunlight also entered into an agreement with the City in 1989 which, among other things, allocated density rights to the property purchased by Owner.

F. "1989 Agreement" means an Agreement between City and Sunlight, entered on March 10, 1989, under which City was granted options to purchase large portions of Sunlight's 939 acres referenced above, Sunlight made a $335,000 contribution to the City's proposed sewer interceptor line for the west side of the Rattlesnake Valley, and Sunlight's lands not subject to the City's options were allocated density rights and sewer loading units for future development of that land. A copy of the 1989 Agreement appears at Adm.Rec. 1046-1056 and is also attached as Exhibit 5 to the Appendix to this brief.

G. "1995 Growth Policy" means the Rattlesnake Valley Comprehensive Plan Amendment, 1995 Update, which is the growth policy applicable to Owner's property. A copy of this Growth Policy is attached as Exhibit C to the Appendix to Neighbor's Motion for SummaryJudgment (Clk.Dck. #39)

H. "Appendix" means the documents attached at the end of this brief and numbered as exhibits.

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The following abbreviations shall be used for the record in this case:

I. "Clk. Dck. ____" refers to the docket number of the document on Clerk of Court's Case Register Report, which lists all pleadings and documents filed in the District Court case. A copy of the Clerk of Court's Case Register Report is attached as Exhibit 1 to the Appendix to this brief.

J. "Adm. Rec. ____" refers to the record of the proceedings before the Missoula City Council on the application of Owner for approval of zoning and the preliminary plat for the Sonata Park Subdivision. This record is contained in three white notebooks filed with the District Court. The Adm. Rec. is numbered in two groups. The first group is contained in the first two white notebooks and consists of all of the documents submitted to and collected by the Missoula Office of Planning and Grants ("OPG")[2] in connection with Owner's application for approval of zoning and the preliminary plat for the Sonata Park Subdivision. This group is numbered in the lower right hand corner of each page, starting with 0001 and running through 1263. The second group consists of the minutes of meetings held by the City on this application. This group is numbered as M-H 01264 through M-H 001521. All of these documents shall be referenced in the format "Adm.Rec. ", followed by the page numbers from that record to which reference is made.

The following is a summary of the proceedings below.

On August 30, 2007, Owner filed its application to approve zoning and the preliminary plat for the Sonata Park Subdivision. (Adm. Rec. 4) After certifying the application as final for review purposes, the Missoula Consolidated Planning Board approved with conditions the zoning and

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[2] OPG is a joint City-County agency which reviews and reports to both the City of Missoula and Missoula County on subdivision applications, among other tasks.

plat applications on December 4, 2007. (Adm. Rec. 1296-1360) Several public meetings on the applications were thereafter held before the Plat, Annexation and Zoning ("PAZ") Committee of the Missoula City Council, and before the full City Council, from December 5, 2007 through December 17, 2007. (Adm. Rec. 1364-1490) Ultimately, on December 17, 2007, the full City Council approved zoning and the preliminary plat for Sonata Park, subject to 34 conditions of final plat approval, by a vote of 10 to 2. (Adm.Rec. 535-549, 1453-1490)

On January 16, 2008, Neighbors and NDDNAI filed their Petition for Judicial Review in the District Court of the 4th Judicial District, Missoula County, Hon. Robert L. Deschamps, III, presiding. (Clk.Dck. #1) In their Petition, Neighbors and NDDNAI sought to set aside the approval of zoning and the preliminary plat for Sonata Park on the ground that both were arbitrary, capricious and unlawful. (Clk.Dck. #1, pp. 10-11) Only City was named as a defendant in the case.

On February 14, 2008, Owner filed its motion to intervene in the case, on the ground that it claimed an interest in the subject matter of the action, and that the disposition of the action would impair its ability to protect that

interest. (Clk.Dck. #5) See Rule 24(a), M.R.Civ.P. This motion was not opposed and was thus granted by Order of the District Court entered on March 10, 2008. (Clk.Dck. #13)

Neighbors and NDDNAI filed their first motion for summary judgment on their Petition for Judicial Review on August 29, 2008. (Clk.Dck. #37-39) In their supporting brief, Neighbors argued that "(t)he central issue before the Court is whether the City of Missoula must adhere to its Growth Policy, and the Rattlesnake Comprehensive Plan that is incorporated into it, in determining the density of subdivisions with the Rattlesnake." [Emphasis added] (Clk.Dck. # 38, p. 1)

City filed its cross-motion for summary judgment on October 16, 2008, seeking determinations that (1) Neighbors and NDDNAI did not have standing to challenge the zoning and preliminary plat approvals for Sonata Park, and alternatively (2) the approvals by City of the zoning and preliminary plat for Sonata Park were not arbitrary, capricious or unlawful. (Clk.Dck. #46-47)

Owner filed its cross-motion for summary judgment on October 3, 2008, seeking a determination that the terms of the 1989 Agreement

between the City and Sunlight superseded the density recommendations of the applicable Growth Policy as they applied to the property on which Sonata Park was to be developed. (Clk.Dck. #41-42)

The District Court initially denied all summary judgment motions by Order dated January 14, 2009, finding that there were disputed issues of material fact concerning the compliance of the Sonata Park zoning and preliminary plat approval with the applicable Growth Policy. (Clk.Rec. #68, pp. 12-13)

Backing up momentarily, on November 10, 2008, Neighbors filed their motion to strike from consideration affidavits submitted by City and Owner in support of their cross-motions for summary judgment. (Clk.Dck. #50-51). Neighbors argued that those affidavits were an improper, after-the-fact attempt to explain the City's decision to approve zoning and the preliminary plat for Sonata Park. (Clk.Dck. #51, pp. 2-6)

Both City (Clk.Dck. #65) and Owner (Clk.Dck. #60) opposed this motion to strike, arguing that the affidavits were all properly considerable to (a) explain the terms of and circumstances surrounding the 1989 Agreement, and (2) the matters which were considered by the City in

considering Owner's application for zoning and plat approval.

On February 19, 2009, the District Court granted Neighbors' motion to strike the Muth Affidavit, and reserved ruling on the City's affidavits. (Clk.Dck. #69)[3]

The parties later stipulated to the contents of an undisputed factual record on appeal, subject to Neighbor's continuing objections to the affidavits submitted by City and Owner. (Clk.Dck. #89) All parties again moved for summary judgment in support of their respective positions. (Clk.Dck. #84-86)

By order entered August 10, 2009, the District Court remanded the proceeding to the Missoula City Council, requesting further written findings to support its approvals of zoning and the preliminary plat for the subdivision. (Clk.Dck. #92) The City filed the requested findings on October 20, 2009. (Clk.Dck. #94)

After further briefing by Neighbors (Clk.Dck. #97) requested by the District Court, on February 24, 2010 the District Court granted Neighbors' motion for summary judgment, and denied the City's and Owner's cross-

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[3] A copy of this Order is attached as Exhibit 2 to the Appendix to this brief.

motions for summary judgment. (Clk.Dck. #98)[4] The District Court ruled that the City's approvals of zoning and the preliminary plat for Sonata Park failed to comply with the density and other recommendations of the applicable Growth Policy, and that those approvals were thus arbitrary, capricious and unlawful. The District Court set aside both approvals. (Clk.Dck. #98, p. 28)

On March 16, 2010, the District Court entered its Final Judgment which incorporated the terms of its February 24, 2010 Opinion and Order, and set aside the City's approvals of the zoning and preliminary plat for the Sonata Park subdivision. (Clk.Dck. #99)[5] That Final Judgment also dismissed all other claims of all parties with prejudice. (Clk.Dck. #99, p. 2)

Owner timely filed its Notice of Appeal on March 22, 2010. (Clk. Dck. #101) City timely filed its Notice of Appeal on April 1, 2010. (Clk. Dck. #103) This Court has jurisdiction over these appeals under Rule 1(b)(1), M.R.App.Proc.

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[4] A copy of this Order is attached as Exhibit 3 to the Appendix to this brief.

[5] A copy of this Final Judgment is attached as Exhibit 4 to the Appendix to this brief.

It is important to note that Neighbors did not cross-appeal from the District Court's denial of their other challenges to the approvals for Sonata Park. Those challenges included the alleged (1) failure of City to issue the written findings of fact required by M.C.A. §76-3-608, (2) failure of Owner to submit an adequate Environmental Assessment, per M.C.A. §76-3-603, in support of its application for subdivision plat approval, (3) failure of City to comply with the requirements of its PUD zoning ordinance, and (4) violation of Neighbors' constitutional rights to know and participate in the subdivision review and approval process.[6] Because Neighbors did not cross-appeal from the District Court's dismissal of these challenges, they may not argue the merits of these challenges in this appeal. Thus, Neighbors are limited in this appeal to arguing, as ruled by the District Court, that the approvals of zoning and the preliminary plat for Sonata Park were "arbitrary, capricious and unlawful" solely because they failed to comply with the applicable Growth Policy.

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[6] See Clk.Dck. #38, pp. 11-20, which is Neighbors' Opening Brief in support of their original motion for summary judgment.

STANDARD OF REVIEW

This Court recently described its standard of review of an order granting summary judgment as follows:

> "This Court reviews a District Court's order granting summary judgment *de novo*. *Waters v. Blagg*, 2008 MT 451, ¶ 8, 348 Mont. 48, 202 P.3d 110 (citing *Bowyer v. Loftus*, 2008 MT 332, ¶ 6, 346 Mont. 182, 194 P.3d 92). Applying the criteria contained in M.R. Civ. P. 56, we determine whether the moving party has established both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Watson v. Dundas*, 2006 MT 104, ¶ 16, 332 Mont. 164, 136 P.3d 973 (citing *Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, 119 P.3d 47)." *Goettel v. Estate of Ball*ard, 2010 MT 140, ¶10, ___ Mont. ___, ___ P.3d ___.

The first order in question on this appeal granted Neighbor's motion to strike the Affidavit of Frank Muth ("Muth Affidavit")[7] submitted in support of Owner's cross-motion for summary judgment. That order concerned the admissibility of the evidence in the Muth Affidavit in connection with Owner's summary judgment motion. This Court "review(s) evidentiary rulings going directly towards the propriety of summary judgment *de novo*, in order to determine whether the evidentiary requirements for summary judgment have been satisfied." *PPL Montana,*

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[7] A copy of the Affidavit of Frank Muth appears at Clk.Dck. #45.

LLC v. State, 2010 MT 64, ¶85, 355 Mont. 402, 229 P.3d 421.

The other two orders being challenged in this appeal were rulings on summary judgment motions. The first denied Owner's motion for summary judgment concerning the effect of the 1989 Agreement on the density recommendations of the applicable Growth Policy. That motion involved the interpretation of the 1989 Agreement. The facts relevant to that motion were uncontested, and the language of the agreement was not ambiguous. The interpretation of an agreement is a question of law which this Court reviews *de novo*. *Kruer v. Three Creeks Ranch of Wyoming, L.L.C.*, 2008 MT 315, ¶37, 346 Mont. 66, 194 P.3d 634.

The second order granted Neighbors' motion for summary judgment to the effect that the approvals of zoning and the preliminary plat for Sonata Park were "arbitrary, capricious and unlawful", because they failed to comply with the terms of the applicable Growth Policy. This too raises a legal question which is reviewed by this Court *de novo*.

Neighbor's claims are based upon M.C.A. §76-3-625, which provides certain parties aggrieved by a decision approving or rejecting a subdivision or zoning application to "appeal" that decision to the District Court. The

applicable standard of review on such an "appeal" is whether the City's action in approving the subdivision or zoning was "arbitrary, capricious, or unlawful," which is the same standard it uses in deciding an appeal from an order of an administrative agency. *Madison River R.V. Ltd. v. Town of Ennis*, 2000 MT 15, ¶30, 298 Mont. 91, 994 P.2d 1098. As a consequence:

> "(R)eversal of the appealed ruling is not permitted 'merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable, or seemingly unmotivated, based on the existing record.'" *Kiely Construction, LLC v. City of Red Lodge*, 2002 MT 241, ¶69, 312 Mont. 52, 57 P.3d 836.

Both *Madison River* and *Kiely* involved 76-3-625 appeals, and both relied upon the seminal decision of this Court in *North Fork Preservation Assn. v. Dept. of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989). This Court in *North Fork* discussed in detail the standard of review to be utilized by a District Court when reviewing administrative decisions. That test requires the Court to only analyze two issues.

First, was the decision "unlawful"? Stated otherwise, did the agency fail to exercise discretion given to it by the law, or did it exceed its powers under the statutes and regulations granting it power. *North Fork*, 238 Mont. at 459-60, 778 P.2d at 867-68. **Second, was the decision**

"arbitrary or capricious"? In making this determination, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *North Fork*, 238 Mont. at 465, 778 P.2d at 871, quoting from *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The *North Fork* Court noted that "this inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Id.* Further, the reviewing court "cannot substitute [its] judgment for that of the [City] by determining whether its decision was 'correct.'" *Id.* Instead, the court must examine the decision to see whether it is "so at odds with [the information presented] that it could be characterized as arbitrary or the product of caprice." *Id.*

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STATEMENT OF FACTS

The property on which Sonata Park is situated has a long history which is relevant to Owner's motion for summary judgment. That history is as follows.

In 1988, Sunlight, a subsidiary of Montana Power Company, owned 939 acres in the northern part of the west side of the Rattlesnake Valley.[8] The 1975 Missoula Urban Area Comprehensive Plan designated Sunlight's 939 acres with a density of 2.66 dwelling units per acre.[9] In 1976, Missoula County (in which the land was then located) zoned this same land for 2.02 dwelling units per acre.[10] This density was followed in the 1988 Rattlesnake Valley Comprehensive Plan Amendment.[11]

In 1988, the City was engaged in planning and funding a proposed main public sewer interceptor line for the west side of the Rattlesnake

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[8] Muth Affidavit (Clk.Dck. # 45), Exhibit 1, p.1. Exhibit 1 to the Muth Affidavit is a copy of the 1989 Agreement, which also appears at Adm.Rec. 1046-1056. A copy of the 1989 Agreement is attached as Exhibit 5 in the Appendix to this brief.

[9] Adm. Rec. 626.

[10] Adm. Rec. 626.

[11] Adm.Rec. 626. As approved, Sonata Park has 37 lots on 34.08 acres, a density of 1.09 dwelling units per acre. (Adm. Rec. 535-536, 547-548; Appendix, Exhibit 7, p. 21, ¶9)

Valley.[12] The City needed money to fund this sewer line.[13] The City was also interested at this time in creating public open space in the area where the Sunlight land was located, particularly along the banks of Rattlesnake Creek.[14] At the same time, Sunlight was interested in developing and selling its 939 acres. These mutual needs resulted in negotiations which culminated in a March 20, 1989 agreement (the 1989 Agreement) between the City and Sunlight.[15]

The 1989 Agreement accomplished three major goals. First, City obtained a contribution of $335,000 from Sunlight for the cost to construct its main interceptor sewer line on the west side of the Rattlesnake Valley.[16] Second, it allocated sewer loading units and density rights to Sunlight's property which was not subject to the Option granted in favor of City.[17]

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[12] Appendix, Exhibit 5, p. 2.

[13] Adm. Rec. 186.

[14] Appendix, Exhibit 5, pp. 3-4; Muth Affidavit, Exhibit 2, p. 2. Exhibit 2 to the Muth Affidavit is a copy of the Option agreement between City and Sunlight referenced in ¶11 of the 1989 Agreement, which was executed at the same time as the 1989 Agreement. A copy of this Option agreement is also attached as Exhibit 6 in the Appendix to this brief.

[15] Appendix, Exhibits 5 and 6.

[16] Appendix, Exhibit 5, p. 2, ¶F.

[17] Appendix, Exhibit 5, pp. 2-3, ¶G; pp. 7-8, ¶9; p. 8, ¶11; Exhibit 6, pp. 1-2, ¶2.

Third, City was granted the options to (a) acquire an approximate 85.7 acre portion of Sunlight's property for use as a riparian zone for Rattlesnake Creek, (b) acquire an additional 260.7 acres of Sunlight's property for use as public open space, and (c) buy down the density rights and sewer loading units allocated to Sunlight's retained 591.8 acres.[18]

In 1991, City exercised all three options under the 1989 Agreement.[19] It thereby acquired and dedicated 346.4 acres of the Sunlight land to riparian zone and public open space, and bought down the density on the remaining 591.8 Sunlight acres to 1000 density rights and 1000 sewer loading units.[20] The end result was that City owned and dedicated to public use about 37% of the former Sunlight property, and reduced the allowable density rights of Sunlight in its retained 591.8 acres to about 1.69 dwelling units per acre.[21]

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[18] Appendix, Exhibit 6, p. 2, ¶2. Density rights are referred to as "density units", "density rights" and "land development rights" in the 1989 Agreement and accompanying Option (see Exhibits 5 and 6 to Appendix). In this brief, they shall uniformly be referred to as "density rights."

[19] Adm.Rec. 626-627.

[20] Adm.Rec. 626-627.

[21] Adm.Rec. 626-627.

Thereafter, in August of 1991, Sunlight sold an approximate 51.27 acre parcel from its retained lands (designated Tract BB-2B) to Frank Muth and Max Hillberry (the members of Owner), along with 40 sewer loading units, 60 density rights, and 16 septic drainfield rights[22]. Muth and Hillberry then organized Owner and transferred this property and rights to Owner.[23] Owner subsequently sold off portions of Tract BB-2B, together with 6 density rights and 6 septic drainfield rights.[24] The net result of these transfers was that Owner retained 40 sewer loading units, 54 density rights, and 10 septic drainfield rights for its remaining property.[25]

In 1995, six (6) years after the 1989 Agreement was consummated, the Growth Policy[26] for the Rattlesnake Valley was updated.[27] Despite the fact that at the time Owner held 60 density rights and 40 sewer loading units

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[22]Adm.Rec. 186-187.

[23]Muth Affidavit, pp. 4-5, ¶6.

[24]Muth Affidavit, p. 5, ¶7.

[25]Muth Affidavit, p. 5, ¶7.

[26]In 1995, this was called a Comprehensive Plan. It is now known as a Growth Policy and has been designated as such in this brief.

[27]Clk.Dck. # 39, Exhibit C.

for its property, this Growth Policy designated part of Owner's land as 1 residence per 5 acres, and the remainder as 1 residence for 2-3 acres, an average of 1 dwelling unit per 3 acres for Owner's property.[28]

Frank Muth participated in the meetings leading up to this Growth Policy update.[29] When the committee proposed much more limited density for Owner's property than allocated under the 1989 Agreement, Mr. Muth advised the committee that at the time Owner held 60 density rights for its land, which could not be impaired by the Growth Policy Update.[30] He was told that the 1989 Agreement was not relevant to the 1995 Growth Policy Update, and that this Update did not affect any of the rights available to Owner under the 1989 Agreement.[31] He was also told that the 1995 Growth Policy Update was designed to provide a general plan of development for the entire Rattlesnake Valley, and that rights associated with particular pieces of property in the Rattlesnake Valley would not be affected by that

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[28] Adm.Rec. 711-712, ¶¶20-21.

[29] Muth Affidavit, p. 7, ¶10.

[30] Muth Affidavit, p. 7, ¶10.

[31] Muth Affidavit, p. 7, ¶10.

Update.[32]

Ultimately, in 2005, Owner planned Sonata Park on an approximate 34.08 acre portion of Tract BB-2B.[33] At that time, Owner held 40 sewer loading units, 54 density rights, and 10 septic drainfield rights, to be used for this property.[34] Initially Owner proposed a 52 lot subdivision for Sonata Park.[35] However, as a result of subsequent meetings with city planners and the neighbors in the area, Owner reduced the number of lots to 37.[36] As such, Owner was using only 69% (37 ÷ 54) of the density rights remaining for Sonata Park.[37] Owner agreed to give up the remaining 17 density rights for the land on which Sonata Park was to be developed.

Sonata Park was ultimately approved by the City on December 17, 2007 for 37 lots, only 69% of the density rights held by Owner for this

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[32]Muth Affidavit, p. 7, ¶10.

[33]Adm.Rec. 6-13.

[34]Muth Affidavit, p. 5, ¶7.

[35]Adm.Rec. 13

[36]Muth Affidavit, p. 6, ¶8.

[37]Muth Affidavit, p. 6, ¶8.

land.[38]

The approved plan for Sonata Park allocates 15.73 acres for common areas and park land.[39] This amounts to 46% of the total land on which Sonata Park is platted, which is more than four times the park requirement mandated by Montana law.[40] In addition, as a result of the 1989 Agreement, 37% of Sunlight's 939 acres was dedicated to public parks and open riparian space in the same area.[41] The land dedicated to public parks and open space in the area of Sonata Park is unparalleled in the history of Missoula.[42] Most subdivisions barely meet the 11% maximum requirement of Montana law.

During the hearings on the subdivision application, Neighbors maintained that the 1995 Growth Policy Update only allowed 8-11 lots for Sonata Park, and they insisted that this density allocation be followed. [43]

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[38]Adm. Rec. 535-536, 547-548

[39]Muth Affidavit, p. 6, ¶9.

[40]Muth Affidavit, p. 6, ¶9.

[41]Muth Affidavit, p. 6, ¶9.

[42]Adm.Rec. 626-627; Muth Affidavit, p. 6, ¶9.

[43]Adm.Rec. 1415-1427, 1463-1468.

The City overruled their objection, and approved 37 lots.[44] The Neighbors' proposal of 8-11 lots would essentially make Owner's property undevelopable.[45] City demands that public sewer, public water, paved streets, concrete curbs and gutters, and other improvements be installed in Sonata Park.[46] The cost to install these improvements, running well into seven figures, made it economically prohibitive to develop only 8-11 lots on the property.[47]

This suit followed in January of 2008. While Neighbors originally asserted numerous other alleged defects[48] in the review process resulting in the approval of Sonata Park, the only issues in this appeal concern the subdivision's compliance with the recommendations and guidelines of the 1995 Growth Policy.

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[44] Adm. Rec. 535-536, 547-548.

[45] Muth Affidavit, pp. 7-8, ¶11.

[46] Muth Affidavit, pp. 7-8, ¶11.

[47] Muth Affidavit, pp. 7-8, ¶11.

[48] As discussed above (see p. 10), the District Court dismissed all of these objections with prejudice. Neighbors did not cross-appeal from that dismissal. Thus, the only basis for sustaining Neighbors' position in this case is their argument that the approvals of zoning and the preliminary plat for Sonata Park were unlawful because they did not comply with the density and other requirements of the 1995 Growth Policy for this property.

ARGUMENT

I. Summary of Argument: THE DISTRICT COURT ERRONEOUSLY RULED THAT THE MUTH AFFIDAVIT COULD NOT BE CONSIDERED ON OWNER'S SUMMARY JUDGMENT MOTION.

The first issue on this appeal is a procedural one, i.e., whether the Affidavit of Frank Muth[49], who is a member of Owner, should have been considered in connection with Owner's motion for summary judgment.

It is important to recognize that Owner's summary judgment motion did not involve the issue whether the City's decision to approve the preliminary plat and zoning for Sonata Park was arbitrary, capricious or unlawful. Under its motion, Owner sought a ruling that the terms of the 1989 Agreement between the City and Sunlight required that, where there was a conflict between the density allocations of the 1989 Agreement and the applicable growth policy, the zoning process would determine the permissible density for the property. In effect, the 1989 Agreement superseded any density recommendations of any growth policy for the area, and mandated that the zoning process alone would control density for property subject to the 1989 Agreement. Owner sought an order ruling,

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[49]A copy of the Muth Affidavit appears at Clk.Dck. #45.

as a matter of law, that the density recommendations of the 1995 Growth Policy were irrelevant to its property and superseded by the terms of the earlier 1989 Agreement.

The District Court ruled that the Muth Affidavit could not be considered on Owner's motion, because it constituted a post-hearing attempt to explain the reasoning of the City in approving the zoning and preliminary plat for Sonata Park. (Clk.Dck. #69, pp. 1, 6) In so doing, the District Court confused the standard of review applicable to subdivision appeals under M.C.A. §76-3-625, and that applicable to motions for summary judgment on pure legal issues under Rule 56, M.R.Civ.P.

The general rule on appeals under M.C.A. §76-3-625 from subdivision decisions is that the appeal is limited to the administrative record below. However, there are exceptions to that rule. Interestingly, in striking the Muth Affidavit, the District Court relied on this Court's decision in *Skyline Sportsmen's Ass'n v. Board of Land Commissioners*, 286 Mont. 108, 113, 951 P.2d 29, 32 (1997), which held:

> "The standard of review of an informal administrative decision is whether the decision was arbitrary, capricious, or unlawful. *North Fork Pres. v. Dept. of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867. It was appropriate for the District Court, in applying that

> standard, to accept new evidence and not to limit its review to the administrative record. In a proceeding to determine whether an agency decision was arbitrary, capricious, or unlawful, unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision. *Asarco, Inc. v. U.S.E.P.A.* (9th Cir.1980), 616 F.2d 1153, 1160."

Despite this holding allowing the court to consider evidence not in the administrative record, the District Court ruled that the 9th Circuit *Asarco* case cited in the *Skyline Sportsmen's* case limited consideration of new evidence to three situations, namely:

> (1) For background information relevant to the appeal.
>
> (2) For the limited purpose of ascertaining whether the agency considered all of the relevant factors.
>
> (3) For the purpose of ascertaining whether the agency fully explicated its course of conduct or grounds of decision.

See *Asarco, supra,* 616 F.2d a 1160.

The District erred in this ruling. First, the Muth Affidavit was not submitted to establish whether the action of the City was "arbitrary, capricious or unlawful". It was submitted to demonstrate that, as a matter of law, the 1989 Agreement overrode the density recommendations of the 1995 Growth Policy insofar as they concerned Owner's property. Because

Neighbor's entire challenge to the zoning and plat approvals for Sonata Park were based upon that Growth Policy, a ruling that the 1989 Agreement superseded and rendered irrelevant the 1995 Growth Policy would have mooted Neighbor's argument that City's approvals of zoning and the plat for Sonata Park were "arbitrary, capricious and unlawful."

This issue presented by Owner's motion for summary judgment is a pure legal issue, concerning the interpretation of the 1989 Agreement, which this Court must determine *de novo*. *Kruer, supra,* at ¶37. The City's interpretation of the 1989 Agreement is irrelevant. Agency determinations of legal issues are not binding on a District Court, which reviews such determinations for correctness. See *Butterfield v. Sidney Public Schools,* 2001 MT 177, ¶38, 306 Mont. 179, 32 P.3d 1243. In striking the Muth Affidavit, the District Court erred by preventing Owner from submitting admissible evidence to support its motion under Rule 56, M.R.Civ.P.

However, even if this issue were considered under the "arbitrary, capricious, or unlawful" standard of review, the Muth Affidavit was still relevant to whether the City's actions were "unlawful". Because the 1989 Agreement compelled the City to follow the zoning process in determining

density for Sonata Park, and to ignore the provisions of the 1995 Growth Policy for this property, which it did, it was clear that the City's actions were "lawful", and Neighbors' appeal failed as a matter of law. Under the ruling in *Skyline Sportsmen's*, "unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision." *Skyline Sportsmen's, supra,* 286 Mont. at 113, 951 P.2d at 32.

Clearly, the City had to consider the terms of the 1989 Agreement as it affected Owner's property. The Muth Affidavit, which presented that agreement, the matter to which it relates, and the facts relevant to the circumstances under which it was made, was properly presented for that purpose. See M.C.A. Section 28-3-402; *Corporate Air v. Edwards Jet Center,* 2008 MT 283, ¶30, 345 Mont. 336, 190 P.3d 1111.

In summary, the Order of the District Court striking the Muth Affidavit was erroneous. That affidavit should have been considered in ruling on Owner's cross-motion for summary judgment related to the effect of the 1989 Agreement on the permissible density for Sonata Park.

II. Summary of Argument: THE 1989 AGREEMENT SUPERSEDES THE 1995 GROWTH POLICY, AND REQUIRES THAT THE ZONING PROCESS ALONE CONTROLS WHEN THE DENSITY RECOMMENDATIONS OF THE GROWTH POLICY CONFLICT WITH THE DENSITY ALLOCATIONS OF THE 1989 AGREEMENT.

A. The 1989 Agreement Created Vested Rights in Owner Which May Not be Impaired by the Subsequently Adopted Growth Policy

In the District Court, Neighbors argued in effect that the 1989 Agreement was irrelevant to this case. They are wrong. The 1989 Agreement created vested density rights in Owner, subject only to completion of the zoning process for its land. It is undisputed that Owner fully complied with the zoning process. While Owner held 54 density rights in its land under the 1989 Agreement, as a result of the zoning process City granted Owner 37 lots, or density rights. That decision need not comply with the 1995 Growth Policy, as the 1989 Agreement specifically states that the zoning process supersedes any conflicting provisions of the Growth Policy.

The construction and interpretation of a contract is a question of law. *Corporate Air v. Edwards Jet Center*, 2008 MT 283, ¶30, 345 Mont. 336, 190 P.3d 1111. Thus, the interpretation of the 1989 Agreement is a question of law which this Court reviews *de novo*. *United Nat. Ins. Co. v. St. Paul Fire &*

Marine Ins. Co., 2009 MT 269, ¶12, 352 Mont. 105, 214 P.3d 1260.

A copy of the 1989 Agreement is attached as Exhibit 5 to the Appendix to this brief. The factual background regarding the making of this agreement is set forth in the Statement of Facts, *supra*. The effect of this agreement is plainly set forth in the agreement.

First, the 1989 Agreement clearly creates vested "density rights", separate and independent of any "sewer loading units", in Owner. In the District Court, Neighbors argued that they were one and the same. They are wrong.

1. The title to ¶9 on p. 7 of the 1989 Agreement is "Recognition of Density Units and Support Documents". On the other hand, other provisions recognize separate "sewer loading units". (See ¶7, p. 6)

(2) The title to ¶11 on page 8 of the 1989 Agreement is "Option to Acquire Parklands, Open Space, Easements, Sewer Density Units, and Land Development Rights." [Emphasis added] This paragraph grants to City the option to acquire both "sewer density units" and "land development rights" pursuant to the terms of a separate Option to Purchase incorporated into the agreement . While the language describing

the density rights varies from "density units" to "land development rights" to "density rights", these rights are clearly treated differently than "sewer density units" by the 1989 Agreement.

(3) The incorporated Option to Purchase[50] (see pp. 1-2, ¶2) describes the property interests for which City has been granted an option to purchase separately as "density units" and "sewer units". See Option A, part 3), which describes "density units", and Option A, part 4), which describes "sewer rights". Option B describes parts 3) and 4) of Option A as separate "components". Option C also separately describes the property rights being optioned as "density units" and "sewer units". Why describe these two property rights separately if, as claimed by Neighbors, the agreement only grants one right, sewer development units?

(4) ¶11 on page 7 of the Option to Purchase is titled "Limitation on Future Densities". Part A) of ¶11 specifically acknowledges that the agreement creates density rights by stating:

> ". . .if [City or County] subsequently rezones [Sunlight's] retained lands so as to **increase** the aggregate, overall allowable densities thereon, [Sunlight] and its successors or assigns shall nevertheless continue to be limited to the **density allowances** to which [Sunlight]

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[50] A copy of the Option to Purchase is attached as Exhibit 6 to the Appendix to this Brief.

is agreeing in this Option." [Emphasis added]

While the reference to optioned rights changes from "land development rights" to "density units" to "density allowances", the one constant is that they are treated differently than "sewer development or loading units". This paragraph commits Owner to no greater density than allowed by the 1989 Agreement, even if subsequent zoning were to approve a greater density. In essence, a "cap" on density rights is imposed on Owner's property.

(5) ¶11A of the Option also treats "density units" and "sewer development units" separately. The last sentence of this paragraph requires Sunlight to allocate these two separate rights to its property being conveyed to third parties in the future. Sunlight did so. (Adm.Rec. 186)

It is also important to recognize that Sunlight did not need to hook up to public sewer in order to develop a single family residence using one of these density rights. ¶11(B) on pages 7-8 of the Option restricts the number of private septic drainfield systems which can be utilized on Sunlight's property. Thus, Sunlight and its successors could utilize a density right with an allowed septic drainfield right, without using a sewer

development unit [right to hook up to public sewer], in order to build one home on a lot. This strengthens the conclusion that sewer development rights and density units are treated as separate and distinct rights under the 1989 Agreement.

In short, the plain language of the 1989 Agreement creates vested "density rights" in Owner, independent of any right to hook up to the city sewer. These rights may not be impaired by a subsequently adopted Growth Policy.[51] The question which remains is what effect does the 1989 Agreement have on the 1995 Growth Policy.

B. The 1989 Agreement Dictates That the Zoning Process, and Not the Growth Policy, Shall Control in the Event of a Conflict Between the Density Allocations in the 1989 Agreement and the Growth Policy.

Paragraph 9 of the 1989 Agreement specifically addresses this issue.

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[51] In the District Court, Owner argued that any attempt to use the Growth Policy to override provisions of the 1989 Agreement would violate the constitutional prohibition on the impairment of contracts (U.S. Constitution, Article I, Section 10, Clause 1). It is settled that a governmental entity can not impair a contract into which it has entered, any more than it can impair a contract between private parties. *Woodruff v. Trapnall,* 51 U.S. 190, 197, 1850 WL 6893 (1850). When the rights of a party to a contract with a governmental entity become vested, the government may only impair, or take, those rights by paying just compensation for the deprivation. See *U.S. Trust Co. of New York v. New Jersey,* 431 U.S. 1, 19, fn. 16, 97 S.Ct. 1505 (1977). Article 2, Section 31, of the Montana Constitution contains a similar prohibition against "impairing the obligation of contracts" by a governmental entity. See generally *City of Billings v. County Water Dist. of Billings Heights,* 281 Mont. 219, 228, 935 P.2d 246, 251 (1997). It is not necessary to address that issue now, unless the Court rules that the provisions of the Growth Policy override those of the 1989 Agreement. Owner reserves the right to address this issue further in its Reply Brief if Neighbors make such an argument in their Opposition Brief.

It provides as follows:

> "The parties agree that in the event of a conflict between the adopted comprehensive plan's land use designation for a parcel and the adopted zoning designation, the land use designation of the zoning controls subject, however, to other issues addressed in both the comprehensive plan and applicable zoning." [Emphasis added]

Thus, where the land use designation of the Growth Policy suggests[52] a less dense use than allowed by the 1989 Agreement, the zoning process controls the issue. "Other" non-zoning issues would still be subject to the recommendations of the Growth Policy. Here Owner followed the 1989 Agreement and utilized the zoning process to seek greater density than allowed by the Growth Policy, but less than allowed by the 1989 Agreement. As a result of the use of the zoning process, City allowed 37 lots for Sonata Park, less than the 54 allowed by the 1989 Agreement but more than the 8-11 allowed by the Growth Policy. That zoning decision is binding pursuant to the terms of the 1989 Agreement.

Neighbors would have this Court review this zoning decision in a vacuum, disregarding the substantial work on density studies for the area which were completed as part of the negotiations leading up to the 1989

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[52] As discussed later in this brief, under the law the provisions of the Growth Policy are only recommendations. They are not binding on the City.

Agreement. Paragraph G on page 2 of the 1989 Agreement acknowledges this work by stating that the parties have agreed to density allocations for the property "based upon a general density allocation study completed by the design engineers Sorenson and Company." Further, paragraph I on page 4 of the 1989 Agreement acknowledges these density allocations were agreed "after extensive negotiations" between the parties. The density allocations for Owner's property were achieved after years of work designed to achieve a fair balance of the public's needs and the rights of the individual property owners. The simple fact is that Owner's property is unique, and subject to a special agreement under which the public obtained significant open space and riparian lands at far below market values, and a very substantial capital contribution to the City's public sewer project for the area.

In summary, the 1989 Agreement supersedes any contrary terms of the 1995 Growth Policy. It requires that the zoning process alone be utilized to determine the appropriate uses and densities for the 939 acres formerly owned by Sunlight. Owner utilized that process, and obtained a compromise density allocation of 37 lots for its property. That decision can

not be overturned. The density allocations of the 1995 Growth Policy are simply irrelevant to this case.

III. Summary of Argument: EVEN IF THE PROVISIONS OF THE 1995 GROWTH POLICY WERE APPLICABLE TO OWNER'S PROPERTY, THE REQUIREMENTS OF M.C.A §76-1-605 RELATIVE TO THE USE OF GROWTH POLICIES IN LAND USE DECISIONS WERE SATISFIED IN THIS CASE.

A. The 2003 Amendment to M.C.A. §76-1-605 Precludes a Governing Body from Basing a Land Use Decision Such as Zoning Only on the Terms of a Growth Policy.

In the District Court, Neighbors stated that "(t)he central issue before the Court is whether the City of Missoula must adhere to its Growth Policy, and the Rattlesnake Comprehensive Plan that is incorporated into it, in determining the density of subdivisions within the Rattlesnake" Valley.[53] This position squarely focuses upon the essence of this case—must City abide by the density recommendations of a Growth Policy when zoning land within its borders? Montana law clearly says "NO".

Prior to 2003, this Court required a land use decision to "substantially comply"[54] with a growth policy (previously called a comprehensive plan).

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[53] Clk.Dck. #38, p. 1.

[54] Later in this brief, it is argued that the zoning decision in this case does comply with many of the provisions of the 1995 Growth Policy. This section assumes that it does not.

Citizen Advocates for a Livable Missoula -vs- City of Missoula, 2006 MT 47, ¶23, 331 Mont. 269, 130 P.3d 1259. However, the 2003 Legislature changed that rule by amending M.C.A. §76-1-605, which discusses the use of growth policies in land planning. It changed this rule as follows:

Section (1): The City must be "**guided by and give consideration to** the **general policy and pattern of development** set out in the growth policy". [Emphasis added] It does not state, as suggested by Neighbors, that the City must substantially comply with the Growth Policy.

Subsection (2)(a): A "growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law." In other words, a Growth Policy does not create legal requirements, but only sets forth general recommendations for future development.

Subsection (2)(b): This subsection reinforces this principle by providing that a "governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter." Again, a growth policy only sets forth general recommendations for future

development, not strict legal requirements. And a land use decision like zoning may not be based solely on non-compliance with the terms of a Growth Policy. That is precisely what Neighbors are arguing in this case, namely that the zoning for Sonata Park must be voided solely because it does not comply with the density recommendations of the Growth Policy.

In *Citizen Advocates*, this Court discussed the effect of this 2003 amendment and noted:

> "From its plain reading, it may be assumed that the 2003 [amendment to M.C.A. 76-1-605(2)] was intended **to reduce in some fashion** the reliance which local governing bodies are required to place upon growth policies when making land use decisions." [Emphasis added] *Citizen Advocates, supra*, at ¶25.

This Court in *Citizen Advocates* did not decide what reduced weight should be given to a growth policy in light of this amendment. However, it is clear under *Citizen Advocates* that the old "substantial compliance" rule did not survive the 2003 Amendment of Section 76-1-605.

In this case, the District Court overruled the instant zoning decision based solely upon its alleged non-compliance with several provisions of the 1995 Growth Policy. This was error. M.C.A. §76-1-605(2)(b) clearly prohibits the use of a growth policy for this purpose. Because Neighbors

offer no other reason for voiding this zoning decision, and rely solely on the terms of the adopted growth policy, their challenge to the adopted zoning fails as a matter of law.

In the District Court, Neighbors argued that *North 93 Neighbors, Inc. v. Flathead County*, 2006 MT 132, 332 Mont. 327, 137 P.3d 557, decided after *Citizen Advocates*, returned to the "substantial compliance" standard. They are wrong. The local growth policy in *North 93 Neighbors* **required** the county to comply with that growth policy in land use decisions, and to make specific fact findings "as to the conformance of the" policy to the issue in question. *North 93 Neighbors*, at ¶23. *North 93 Neighbors* involved a **local ordinance** which required land use decisions to comply with the growth policy, not the effect of 76-1-605 where no such ordinance exists.

In this case, City has no such requirement in its ordinances or regulations. Indeed, the instant Growth Policy specifically recognizes that decisions may be made by City which do **not** comply with the general objectives of that growth policy. The 2003 Amendments to 76-1-605 remain in force.

The 1995 Growth Policy recognizes that certain land use decisions will not comply with all of its goals and objectives. For example, it states:

> "When making decisions based on the Plan, *not all of the goals, policies, and proposals for action can be met to the same degree in every instance.* Use of the Plan requires a balancing of its various components on a case-by-case basis, as well as *a selection of those goals, policies and proposals most pertinent to the issue at hand."*[55] [Emphasis added]

Further, the 1995 Growth Policy states:

> "The common theme of all the goals, policies, and proposals for action is acceptance of them as [a] suitable approach toward problem-solving and goal realization. *Other valid approaches may exist and may at any time be used. Adoption of the Plan does not necessarily commit the City to immediately carry out each policy to the letter,* but does put the City on record as having recognized the desirability of the goals, policies and proposals for actions and the decision or actions they imply." [56] [Emphasis added]

The language of the very Growth Policy relied upon by Neighbors belies their argument. That language provides for flexibility when applying it, allowing the City to **not** meet some goals of the Growth Policy, while following other goals it deems to be more important. This is the essence of the subdivision review and zoning process, "balancing" various

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[55] Clk.Dck. #39, Exhibit C, pp. 3-4. These pages are copies of the City and County Resolutions adopting the 1995 Growth Policy.

[56] See footnote 55.

goals and objectives and arriving at a plan which works best for the property in question.

In summary, the "substantial compliance" rule is no longer required in Montana, unless the local governing body adopts an ordinance or regulation which requires such compliance. No such ordinance or regulation exists in this case. To the contrary, the specific Growth Policy involved here acknowledges that compliance with all terms of the growth policy can not be attained in the normal case, and is not required where other objectives are met. Moreover, a zoning decision may not be based solely upon its compliance or not with the Growth Policy. M.C.A. §76-1-605(2)(b). The decision of the District Court overturning the zoning decision here was error and should be reversed.

B. The Zoning Decision in This Case Does Sufficiently Comply with the Goals of the 1995 Growth Policy.

A copy of the relevant Growth Policy is attached at Clk.Dck. #39, Exhibit C. In this section it will be argued that the zoning adopted for Sonata Park does comply sufficiently with most, although not all, of the recommendations of that growth policy.

First, it is important to recognize that Montana law treats a growth

policy as a guideline, not a requirement. M.C.A. §76-1-605(1) states that City must be "guided by and give consideration to the general policy and pattern of development set out in the growth policy. . ." It does not state, as argued by Neighbors, that the density recommendations, or any other goals, of the growth policy must be followed in zoning decisions. It only requires City to consider the "general policy and pattern of development" underlying the growth policy.

In the District Court, Neighbors argued that the City failed to give appropriate consideration to the density recommendations of the 1995 Growth Policy. They essentially contended that the City was *required* to follow the density recommendations of the 1995 Growth Policy, and only permit 8-11 homes on the 34.08 acres on which Sonata Park is situated. In the preceding section, it is argued that the 2003 amendment to M.C.A. §76-1-605 rejects that argument as a matter of law. In this section, it will be demonstrated that the City's decision to approve zoning and plat approval for Sonata Park does sufficiently comply with the growth policy compliance standard of Montana law.

In *Citizens Advocates*, this Court discussed the "substantial

compliance" test and held that a subdivision **can** "substantially comply" with a growth policy even where it is **not** consistent with all goals and policies of that plan. This Court noted that various aspects of the development in that case:

> "(a)re not consistent with the neighborhood plan. However, it cannot be denied that the proposal is very consistent with other parts of the plan. Surely, not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. To impose such a requirement would remove flexibility from a city's review of zoning proposals and make growth policies a rigid regulation, even exceeding the standard of 'substantial compliance'." *Citizen Advocates, supra,* at ¶30.

Neighbors' sole complaint is that Sonata Park does not meet the **density** recommendation of the 1995 Growth Policy for Owner's property. This is true. However, they ignore that Sonata Park meets numerous other objectives of the 1995 Growth Policy. Set forth below is a discussion of various goals of the 1995 Growth Policy (set forth in bold), with an explanation of how that goal was satisfied immediately following.

1. **Residential Use:** The Growth Policy recommends a single family residential use for Owner's property.[57] Sonata Park consists

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[57]Clk.Dck. #39, Exhibit C, Map No. 13; Appendix, Exhibit 7, pp. 5-6, ¶32.

entirely of single family homes.[58]

2. **Locate new development near existing public services or where public services can be readily extended.**[59] This is perhaps the single largest factor by which Sonata Park complies with goals of the 1995 Growth Policy. Not only the Growth Policy but the Missoula Urban Growth Plan promote development where public sewer and water are available.[60] Sonata Park complies with this goal by providing for development where city sewer and water are planned and available.[61]

3. **Reduce groundwater pollution and pollution of Rattlesnake Creek by limiting development and roadways adjacent to the creek, by expanding sewer service into the priority portions of the Rattlesnake Valley.**[62] Sonata Park does this by bringing public

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[58]Appendix, Exhibit 7, p. 5, ¶32 and p. 7, ¶40. Exhibit 7 to the Appendix is a copy of the City's Findings of Fact and Conclusions of Law entered on the application of Owner to approve zoning and the preliminary plat for Sonata Park. These Findings of Fact and Conclusions of Law also appear at Clk.Dck. #94.

[59]Clk.Dck. #39, Exhibit C, p. 20.

[60]Appendix, Exhibit 7, pp. 4-5, ¶¶23-31.

[61]Appendix, Exhibit 7, p. 8, ¶¶47-48.

[62]Clk.Dck. #39, Exhibit C, p. 18.

sewer and water to the property and developing away from Rattlesnake Creek.[63]

4. **Improve accessibility, especially for pedestrians and bicyclists, to designated open spaces and recreational areas.**[64] Sonata Park provides open space corridors for wildlife travel, as well as pedestrians, between the substantial City owned open space areas in the neighborhood.[65]

5. **Protect natural resources such as wildlife corridors and habitat.**[66] Wildlife corridors are protected in Sonata Park with the open space corridor running the entire width of the property, from the public park in the Papoose 2 Subdivision on the eastern boundary of Sonata Park, to the City open space located on the western boundary. Indeed, Owner was required to move three of its proposed lots which

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[63]Appendix, Exhibit 7, p. 8, ¶47; Clk.Dck. #39, Exhibit C, Map No. 20.

[64]Clk.Dck. #39, Exhibit C, p. 19.

[65]Appendix, Exhibit 7, p. 20, ¶4; p. 25, ¶5; p. 26, ¶¶4-8.

[66]Clk.Dck. #39, Exhibit C, p. 19.

interfered with a natural wildlife corridor on the property.[67]

6. **Preserve the maximum amount of open space.**[68] Under the 1989 Agreement, 37% of Sunlight's 939 acres was dedicated to open space and public parks. Sonata Park provides for an additional 44% of its lands to be dedicated to open space and public parks. This contribution of open space is unparalleled in the history of development in the City.[69]

7. **Improve bicycle and pedestrian opportunities by linking neighborhoods, open spaces, and pocket parks with different classes of trails and paths to existing destinations and by developing an on-street network of bicycle routes and pedestrian facilities.**[70] As discussed above, Sonata Park includes a wildlife/pedestrian corridor the entire width of the project, which corridor links the other City owned open spaces in the neighborhood.[71]

8. **Provide connections between neighborhoods to parks, open**

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[67]See footnote 65; Appendix, Exhibit 7, pp. 12-13, ¶¶83-92.

[68]Clk.Dck. #39, p. 19.

[69]Muth Affidavit, p. 6, ¶9; Appendix, Exhibit 7, pp. 25-26, ¶¶1-14.

[70]Clk.Dck. #39, p. 19.

[71]See footnote 67.

spaces, churches, commercial areas, and schools.[72] Sonata Park accomplishes this goal.[73]

9. **Provide adequate parkland and developed playfields.**[74] As discussed above, under the 1989 Agreement Sunlight contributed 37% (346 acres) of the larger parcel from which Sonata Park is created for open space and public parks. Sonata Park contributes 44% of its lands for public parks and open space.[75] The statutory requirement is 7½% [see M.C.A. §76-3-621(1)(b)].

10. **Have new development pay its own way on the one hand, and not expect new development to take care of current needs on the other.**[76] Numerous factual findings of the City establish that Sonata Park will have substantial Owner paid improvements which minimize the impact of the subdivision on local services .[77] Further, more dwelling units

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[72]Clk.Dck. #39, p. 20.

[73]See footnote 67.

[74]Clk.Dck. #39, p. 20.

[75]See footnote 69.

[76]Clk.Dck. #39, Exhibit C, p. 20.

[77]Appendix, Exhibit 7, pp. 22-24, ¶¶1-36.

generate additional tax revenues so that Sonata Park can carry its fair share of the cost of providing public services to this subdivision.

11. **Protect private property owner rights (develop their land on the one hand and accept cultural and physical limits to development on the other).**[78] As discussed above, the 1989 Agreement, under which the City received $335,000 to construct the Rattlesnake Sewer Interceptor and 346 acres of open space in the area, assured Owner that it could build up to 60 dwelling on this property.[79] 54 of those dwelling units remain. With the proposed density of 37 dwelling units, the value given for 17 of those dwelling units will be lost forever.

12. **Recognize the Rattlesnake as a part of the Missoula community, supporting the same quality of life enjoyed by all Missoula residents.**[80] [Emphasis added] This lies at the heart of this subdivision application. Immediately prior to approving Sonata Park for 37 lots, the City approved a density of 6 dwelling units per acre in the Linda Vista area

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[78]Clk.Dck. #39, Exhibit C, p. 20.

[79]Muth Affidavit, p. 6, ¶¶7-8.

[80]Clk.Dck. #39, Exhibit 2, p. 21.

lying on the south side of Missoula. Numerous projects in the same time frame were approved with densities of 4 dwelling units per acre and greater. Sonata Park provides for 1.09 dwelling units per acre, which by far is the least dense neighborhood in the entire City, including the Rattlesnake Valley itself. [81] Neighbors refuse to accept their fair share of the exploding growth in the City. The Growth Policy is designed to spread that growth around the City in an equitable manner.

The District Court, on the other hand, argued **the merits** of the City's application of the goals of the Growth Policy, contrary to its role of determining whether the City acted "arbitrarily or capriciously". The following are but examples of its approach:

A. The City found that Sonata Park satisfied the goal of minimizing air pollution by prohibiting wood burning stoves and fireplaces in the subdivision. The City also added a condition of approval that Owner petition this subdivision into the local bus line district. The District Court criticized this reasoning, stating that there was no showing that Owner had actually petitioned and received approval for the property

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[81] Adm.Rec. 378; Appendix, Exhibit 7, p. 21, ¶9.

to be included in the bus line district.[82] This reasoning reflects a misunderstanding of the subdivision approval process. Conditions to preliminary plat approval are only satisfied after the preliminary plat is finally approved, during the process of preparing the final subdivision plat. M.C.A. §76-3-611(1)(a). In this case, Owner could not start the final plat approval process because of the instant lawsuit. Until the validity of the preliminary plat of Sonata Park is finally confirmed in this case, it would be pointless to address conditions of final plat approval. A decision voiding the preliminary plat would nullify all of that work.

2. After noting that the 1995 Growth Policy encouraged growth in areas where public services are available, the District Court states that the City erroneously decided that this goal was satisfied.[83] The District Court ignored that the City included this property in the Missoula Primary Urban Growth Area and the Waterwaster Facilities Service Area, and that the conditions of preliminary plat approval required Owner to bring all public services, including city sewer and water, to the subdivision, at a very

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[82]Clk.Dck. #98, p.11.

[83]Clk.Dck. #98, p.12.

substantial cost.[84] Again the District Court faulted the City for not doing something which could only be completed after this lawsuit is finally resolved, and Owner is allowed to satisfy the conditions of preliminary plat approval during the final plat approval process. M.C.A. §76-3-611(1)(a).

3. After citing a goal of the 1995 Growth Policy which encourages clustered homesites and land preservation techniques, and noting that the City required (a) clustered homesites, (b) 16.26 acres to be set aside for common area (which is approximately 48% of the total area covered by Sonata Park), and removal of four lots in a woody draw to protect wildlife habitat, the District Court found that this plan "falls short".[85] The District Court obviously disagrees with the City's balancing of the goals of the Growth Policy, as these requirements not only meet but plainly exceed the goals of the Growth Policy. The function of the District Court is to determine if the City's actions were ""so at odds with [the information presented] that it could be characterized as arbitrary or the product of

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[84]Appendix, Exhibit 7, p. 4, ¶¶23-26; p. 8, ¶¶47-48.

[85]Clk.Dck. #98, pp.12-15.

caprice." *North Fork, supra,* 238 Mont. at 465, 778 P.2d at 871. It is not allowed to disagree with the merits of the City's balancing of the various factors relevant to its decision.

The balance of the District Court decision reveals that the District Court committed this same error throughout its Opinion, and that it essentially "substitute(d) [its] judgment for that of the [City] by determining whether [the City's] decision was 'correct.'" *Id.* On the other hand, a fair reading of the City's Findings of Fact and Conclusions of Law[86] demonstrates that the City considered all of the factors of the Growth Policy, and made provisions to satisfy as many of those goals as possible, consistent with the practical and economic realities of this situation.

The District Court's judgment should be reversed, and this case dismissed with prejudice.

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[86]Appendix, Exhibit 7.

CONCLUSION

The District Court decision revoking the zoning and subdivision plat approvals for the Sonata Park subdivision was erroneous for three separate and independent reasons, any one of which is sufficient to require reversal of that decision. They are:

1. The 1989 Agreement created vested rights for Owner in the Sonata Park land. That agreement provides that where the density allocations of the agreement conflict with the provisions of an applicable growth policy, the zoning process controls. Owner sought and obtained approval for 37 lots for Sonata Park utilizing the zoning process. The 1989 Agreement exempts this approval from application of the Growth Policy. The adopted zoning controls as a matter of law.

2. The failure of the zoning for Sonata Park to comply with the density or any other recommendations of the Growth Policy for the Sonata Park property cannot, as a matter of law, be used to deny plat or zoning approval for that subdivision. The 2003 amendments to M.C.A. §76-1-605. prohibit the use of the Growth Policy alone as the basis for a land use decision. Because the only alleged deficiencies of Sonata Park are based upon the 1995 Growth Policy, the subdivision and zoning approvals must be upheld as a matter of law.

3. While Sonata Park does not comply with all goals of the 1995 Growth Policy, primarily the density recommendation for the property, it does comply with numerous other goals of that policy. The City gave "due consideration" to the 1995 Growth Policy in approving the preliminary plat and zoning for this subdivision, which must be affirmed due to the limited standard of review of this Court for such decisions.

/ / /

Owner respectfully requests this Court to reverse the decision of the District Court, and to remand this case to the District Court, with instructions to dismiss Neighbor's Complaint and all claims therein with prejudice.

RESPECTFULLY SUBMITTED this 14 day of July, 2010.

SNAVELY LAW FIRM
Attorney for Appellant and
Intervenor Muth-Hillberry, LLC

By: _____
Donald V. Snavely

CERTIFICATE OF COMPLIANCE WITH RULE 27, M.R.APP.PROC.

I hereby certify, pursuant to Rule 27(d)(iv), M.R. App.Proc., that the foregoing brief is double spaced, using Book Antigua proportionately spaced typeface, 14 point size, and that the word count, using Microsoft Word for Windows, 2007 version, is less than 10,000 words, with no more than 280 words per page, excluding the table of contents, table of authorities, certificate of service, this certificate of compliance, and the attached Appendix.

RESPECTFULLY SUBMITTED this 14 day of July, 2010.

SNAVELY LAW FIRM
Attorney for Appellant and
Intervenor Muth-Hillberry, LLC

By: _____
Donald V. Snavely

CERTIFICATE OF SERVICE BY MAIL

Don Snavely certifies as follows:

I am employed by Snavely Law Firm, the attorneys for Appellant/Intervenor Muth-Hillberry, LLC, in this appeal. On July 14, 2010, I served a complete copy of the foregoing Opening Brief of Appellant Muth-Hillberry, LLC on each attorney/party of record in this action by depositing the same in the United States Mails, at Missoula, Montana, in a separate envelope with the postage prepaid thereon, first class mail, addressed to each of the persons indicated below:

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EXECUTED on July 14, 2010 at Missoula, Montana.

Don Snavely